No. 94-834

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In the Supreme Court of the United States

OCTOBER TERM, 1994

NORTH STAR STEEL COMPANY,
Petitioner,
v.
CHARLES A. THOMAS, *et al.*,
Respondents.

CROWN, CORK & SEAL CO., INC.,
Petitioner,
v.
UNITED STEELWORKERS OF AMERICA, AFL-CIO/CLC,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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BRIEF OF *AMICI CURIAE* CALIFORNIA RURAL LEGAL ASSISTANCE, INC., JOHN HALKIAS, BARRY JACKSON,

(Additional *Amici* Listed Inside Cover)

IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

In actions brought under the Workers' Adjustment Retraining Notification Act (WARN), 29 U.S.C. § 2101 *et seq.*, should courts borrow an analogous state limitations period, or another analogous federal statute, or rely instead upon the six-month period provided for in the National Labor Relations Act (NLRA), 29 U.S.C. § 160 (b)?

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BRIEF OF *AMICI CURIAE* CALIFORNIA RURAL LEGAL ASSISTANCE, INC., JOHN HALKIAS, BARRY JACKSON, THE FEDERATION FOR INDUSTRIAL RETENTION AND RENEWAL, THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, INTERNATIONAL LADIES' GARMENT WORKERS' UNION, INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, OIL, CHEMICAL AND ATOMIC WORKERS INTERNATIONAL UNION, UNITED MINE WORKERS OF AMERICA, INTERNATIONAL UNION, MAURICE AND JANE SUGAR LAW CENTER FOR ECONOMIC AND SOCIAL JUSTICE, AND UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, AFL-CIO & CLC IN SUPPORT OF RESPONDENTS

STATEMENT OF INTEREST OF *AMICI CURIAE* *

CALIFORNIA RURAL LEGAL ASSISTANCE, INC. (CRLA) is a legal services program serving the needs of the rural poor. CRLA is particularly concerned about the impact that the adoption of a six-month statute of limitations would have on its clients—seasonal farmworkers—in WARN Act cases. These employees typically have a long and continuous employment relationship with the growers who employ them—in some cases ten years or more. In California, many agricultural producers, who for years maintained their own workforces, are terminating their employees' jobs. For those workers fortunate enough to find other employment the result is lower wages, less job security and a loss of benefits. The impact on the workers, who have planned their lives on the assumption that they would have steady employment, is no less devastating than on other workers. Typically, the growers do not provide 60 days notice prior to the plant closing nor do they give notice to the State dislocated worker unit as required by law. These workers are unfamiliar with the legal system, uninformed as to their legal rights, and lack information concerning how to obtain legal representation. Adoption of a six-month statute of limitations would deprive many of the workers of any redress under the law.

JOHN HALKIAS (now deceased) and BARRY JACKSON are class representatives of a class comprised of non-union/salaried employees holding various positions of employment at the General Dynamics Corporation plants in Fort Worth, Texas, and Tulsa, Oklahoma. The class consists of approximately 2,000 non-union/salaried employees who were laid off in January and February of 1991 without being provided the sixty day notice required by WARN. General Dynamics has claimed that cancel-

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* Letters from the parties consenting to the filing of this brief have been filed with the Clerk of the Court pursuant to Rule 37.3 of the Rules of this Court.

lation of the A-12 Jet Aircraft contract by the United States Navy allowed them to accomplish this layoff without the requisite notice. On June 24, 1993, the District Court granted a motion dismissing the claim finding that the six month statute of limitations under the NLRA governed. On August 24, 1993, the United States Court of Appeals for the Fifth Circuit affirmed this decision with a dissent by Judge Wisdom. On September 22, 1994, without request from any party, the appellate court determined on its own motion to rehear the case en banc, but has put the case on administrative hold awaiting the Supreme Court's opinion in this action. Obviously, this class has a direct interest in the outcome of this litigation.

THE FEDERATION FOR INDUSTRIAL RETENTION AND RENEWAL was established in 1988 and is a nationwide network of 32 community-based organizations challenging deindustrialization by implementing models for local, state and federal community-responsible industrial policy. Among its member organizations are: Cleveland Coalition Against Plant Closings; Midwest Center for Labor Research of Chicago, Illinois; Seattle Workers' Center; Tennessee Industrial Renewal Network of Knoxville, Tennessee; Tri-State Conference on Manufacturing of Pittsburgh, Pennsylvania; Coalition for Economic Justice of Buffalo, New York; Tompkins/Cortland Labor Coalition of Ithaca, New York; CommonWorks of Syracuse, New York; the Ohio Valley Industrial Renewal Project of Wheeling, West Virginia; and the Working Group on Economic Dislocation of St. Paul, Minnesota.

THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS (IBT) is the largest union affiliated with the AFL-CIO representing 1.4 milion members under 26,000 collective bargaining agreements throughout the United States and Canada. Approximately 80,000 members of the IBT are currently employed in the trucking industry and are covered by the Teamsters' National

Master Freight Agreement. The deregulation of the trucking industry in 1980 resulted in a large number of shutdowns of general freight motor carriers impacting a significant number of Teamster members employed in that industry. Teamster membership in other industries has also been impacted by plant closings around the country. The IBT has a substantial interest in insuring that the federal rights of its members under the WARN Act are effectively enforced.

The INTERNATIONAL LADIES' GARMENT WORKERS' UNION is one of the largest unions in the United States and Canada representing apparel and clothing workers. It has about 155,000 members and in June 1995 it is scheduled to merge with the Amalgamated Clothing and Textile Workers' Union which will result in the creation of the largest union of garment and textile workers on the American continent with 335,000 members. Garment and textile workers are low paid and typically insensitive to their legal rights. Many are newly arrived immigrants with poor language skills. Only about 25% to 30% are represented by unions. Garment and textile workers, like farm workers, work in a highly seasonal industry. Many of these workers, union and non-union alike, would be deprived of any redress under the WARN Act if a six month statute of limitation was adopted.

The INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL WORKERS OF AMERICA (UAW) is a labor organization of about 900,000 active members and more than 500,000 retired members. The UAW has been and continues to represent their members in litigation pursuant to the WARN Act. Accordingly, the UAW joins in the filing of this brief in support of Respondents.

The OIL, CHEMICAL AND ATOMIC WORKERS INTERNATIONAL UNION (OCAWIU) is a labor organization which represents employees throughout the

country. The right of OCAWIU to file WARN claims on behalf of its members will be directly affected by the outcome of this proceeding. OCAWIU has been, and continues to represent their members in WARN Act litigation. For these reasons, the OCAWIU submits this *amici curiae* on behalf of Respondents.

The UNITED MINE WORKERS OF AMERICA, INTERNATIONAL UNION (UMWA) is a labor organization headquartered in Washington, D.C. The UMWA has approximately 200,000 members in the United States, most of whom are coal miners. The UMWA and its members, as well as coal dependent communities throughout the country's coal fields, have a significant interest in the rigorous enforcement of the WARN Act due to the nature of coal as a depletable resource, thus occasioning the continuous shutdown and relocation of mining operations. The UMWA has and continues to represent their members in WARN Act litigation. Therefore, the UMWA joins in this brief in support of Respondents.

The MAURICE AND JANE SUGAR LAW CENTER FOR ECONOMIC AND SOCIAL JUSTICE (Guild Law Center) is a national public interest litigation center that has concentrated its efforts in the area of plant closings and mass layoffs, particularly on the rights of dislocated workers through the enforcement of the WARN Act. As the national clearinghouse for all WARN Act litigation, the Guild Law Center represents hundreds of workers directly and thousands indirectly by providing technical assistance to their attorneys. The Guild Law Center is currently representing both union and non-union workers in three cases which will be affected by a ruling from this court: *Wallace, et al. v. Detroit Coke Corporation, et al.*, 92 CV72890-DT (filed 4/28/92); *Oil, Chemical and Atomic Workers Union v. RMI Titanium Company*, C.A. # 4:92 CV 1679 (N.D.E.D. Ohio) filed 8/16/92), and *Oil, Chemical and Atomic Workers Union v. El Paso/CIT*, Case No. H-93-3506 (S.D. Tex.) (filed 11/3/93). The

Guild Law Center thus represents the interests of WARN plaintiffs across the country, in the outcome of this proceeding, and submits this *amici curiae* brief on behalf of Respondents

The UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, AFL-CIO & CLC, is a labor organization of 1,400,000 members representing workers across the United States in the meat packing and other food processing, supermarket and other retail, nursing home and hospital, and insurance industries. UFCW membership has experienced many plant closings and mass layoffs in the current economic climate. The WARN Act statute of limitations issue directly impacts the UFCW, as the Union has experienced first-hand and time-consuming complexities of concurrently assisting displaced workers in enforcing their employment rights upon dislocation and preparing for future work. The UFCW is currently representing former members in WARN Act litigation; one case in the United States District Court for the Eastern District of Missouri involves the very issue which is the subject of the Court's review in these consolidated cases. Accordingly, the UFCW has a keen interest in the issue being litigated and joins in this brief in support of Respondents.

The issues presented in this case have a direct impact on the rights of the clients and members of the *amici* herein. The several hundred thousand workers represented by the *amici* have an interest in the outcome of this litigation because it will directly affect their ability to effectively enforce their substantive federal rights under WARN. *Amici* urge this Court to adhere to the usual rule of borrowing a limitations period from state law because the analogous state statute of limitations provide a closer fit than does the National Labor Relations Act.

SUMMARY OF ARGUMENT

This Court should follow the general rule which calls for applying an analogous state statute of limitations where Congress has not provided a specific limitations period in a federal cause of action in actions brought pursuant to the Worker's Adjustment Retraining Notification Act, 29 U.S.C. § 2101 *et seq.* (WARN). The Court of Appeals correctly applied this standard in the consolidated cases below. *Crown, Cork & Seal Co., Inc. v. United Steelworkers of America*, 32 F.3d 53 (3rd Cir. 1994), *cert. granted*, —— U.S. ——, 115 S.Ct. 715, 130 L.Ed.2d 622 (U.S. Jan. 6, 1995) (No 94-835) and *North Star Steel v. Thomas*, 32 F.3d 53 (3rd Cir. 1994), *cert. granted*, —— U.S. ——, 115 S.Ct. 715, 130 L.Ed. 2d 622 (U.S. Jan. 6, 1995) (No. 94-834).

Petitioners' attempt to apply the six-month period available under the § 10(b) of the National Labor Relations Act (NLRA), 29 U.S.C. § 160(b), should be rejected as inappropriate for WARN claims and unwise as a matter of public policy. This was recognized by Judge Wisdom in a passionate dissent in the case *Halkias v. General Dynamics*, 31 F.3d 224 (5th Cir. 1994), *en banc reh'g granted*, Nos. 93-1664, 93-1680, 93-8204 (5th Cir. Sept. 22, 1994), which addressed the identical question presented here.[1] He stated:

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[1] The United States Court of Appeals for the Fifth Circuit decision in *Halkias* was the first appellate court to deviate from the general rule regarding borrowing of state limitations period in WARN Act litigation. The first two appellate courts to address this issue followed this Court's practice. *United Paperworkers Int'l Union And Its Local 340 v. Specialty Paperboard, Inc.*, 999 F.2d 51 (2nd Cir. 1993); *Crown, Cork & Seal Co.*, 32 F.3d 53, and *North Star Steel*, 32 F.3d 53. The Fifth Circuit subsequently vacated its decision and scheduled, sua sponte, a rehearing en banc. Shortly after, the United States Court of Appeals for the Sixth Circuit applied the six-month limitations period within the NLRA. *United Mine Workers v. Peabody Coal Co.*, 38 F.3d 850 (6th Cir. 1994).

> [T]he six months time frame will actually serve to stymie [the Worker's Adjustment Retraining Notification Act's] true objective of giving workers and communities advance notice of impending hard times. By severely limiting the time frame in which potential WARN plaintiffs may file suit, companies can relax a bit and rest assured that they may "make redundant" many legally unsophisticated and unsuspecting workers—particularly non-unionized workers—without suffering the community backlash that will follow an announcement and, better, without the threat of future litigation. An extended limitations period, on the other hand, would function as a deterrent and, thus an enforcement mechanism.

Id. at 248.

WARN Act litigation implicates no collective bargaining rights dictating quick resolution. Moreover, WARN Act rights are, and were specifically intended to be, broader than rights existing under the federal labor laws; the purpose of the WARN Act is not to ensure labor peace but to alleviate the distress associated with job loss for both the workers and the community in which they live. Furthermore, a six-month statute is completely incompatible with a cause of action under the WARN Act's mass layoff provision [2] which expressly requires six months to ripen. Finally, unlike NLRA actions which provide for administrative resolution, dislocated workers seeking to enforce their rights under the WARN Act must assume a much greater burden when seeking recourse themselves through the courts.

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[2] It is noteworthy that the WARN Act makes no distinction between claims brought as the result of a mass layoff and those brought as the result of a plant closing, other than the six month employment loss and its one-third workforce requirements for a mass layoff claim.

ARGUMENT

I. THIS COURT SHOULD APPLY THE TRADITIONAL PRINCIPLES OF *BORROWING*

The circumstances under which federal courts may apply an analogous limitations period from federal, as opposed to state, law are "closely circumscribed." *Reed v. United Transportation Union*, 488 U.S. 319, 324 (1989) (borrowing state period for intra-union lawsuits). The "usual rule" when Congress fails to specify a limitations period in a federally created cause of action is to "borrow" the state statute of limitations that is most analogous to the federal cause of action. *Lampf, Pleva Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350, 355 (1991). In *Lampf* this Court stated:

> It is the usual rule that when Congress has failed to provide a statute of limitations for a federal cause of action, a court "borrows" or "absorbs" the local time limitation most analogous to the case at hand.

Id. at 255.[3] *See also Reed*, 488 U.S. at 324 (1989); *Board of Regents v. Tomanio*, 446 U.S. 478, 483 (1980) (applying state period for federal civil rights claims); *Wilson v. Garcia*, 471 U.S. 261 (1985) (applying state period for federal civil rights claims); *Johnson v. Railway Express Agency*, 421 U.S. 454, 462 (1975) (applying state period for federal employment discrimination claims).

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[3] In *Lampf* this Court permitted application of a federal limitations period to claims brought under Section 10(b) of the Securities Exchange Act because "Congress had provided an express limitations period for correlative remedies within the same enactment." *Lampf*, 350 U.S. at 362 (footnote omitted). Contrary to Petitioner's assertion, Brief at 12, that a majority of this Court agreed to a three-tiered "hierarchical" approach to the *DelCostello* doctrine, this Court was unanimous in its reaffirmation that state limitation periods should govern where Congress does not specify a limitations period.

The Court has drawn an exception to the general rule in a narrow class of cases:

> ". . . when a rule from elsewhere in the federal law clearly provides a closer analogy than available in state statutes and when the federal policies at stake and the practicalities of litigation make that rule a significantly more appropriate vehicle for interstitial lawmaking . . ."

DelCostello v. International Brhd. of Teamsters, 462 U.S. 151, 172 (1983); *Lampf*, 501 U.S. at 356; *Reed*, 488 U.S. at 324.

The arguments raised in support of application of a federal statute of limitation drawn from § 10(b) of the National Labor Relations Act either ignore or grossly distort the presumption which this Court has frequently found in favor of analogous state statutes of limitations. The prior decisions of this Court indicate that departures from the presumption in favor of state statutes of limitations are appropriate only where application of a state statute would adversely affect federal rights. This Court has held that in certain limited circumstances, "state statutes of limitations can be unsatisfactory vehicles for the enforcement of federal law. In these circumstances, it may be inappropriate to conclude that Congress would choose to adopt state rules at odds with the purpose of operation of federal substantive law." *Agency Holding Corp. v. Malley-Duff & Associates, Inc.*, 483 U.S. 143, 147 (1987) (application of federal limitations period in claims brought pursuant to RICO because RICO "encompass[ed] numerous diverse topics and subtopics"); *DelCostello*, 462 U.S. at 161 (applying "narrow exception" for federal "hybrid" action to enforce rights under collective bargaining agreement).

Thus, the question presented in this case is not whether § 10(b) is "more" analogous than the most analogous state statute of limitations, or whether, on balance, appli-

cation of a uniform federal standard would be simpler or more convenient than use of a state statute of limitations. Instead, this Court has so consistently applied state limitations periods to federal laws with no explicit period of limitations that, "we can generally assume Congress intends by its silence that we borrow state law." *Agency-Holding Corp.*, 483 U.S. at 147. This assumption of Congressional intent can only be overcome where there is some failing of the analogous state law—something incompatible between the state statute and the federal rights to be secured such that it would be "inappropriate to conclude that congress would choose to adopt state rules . . . ." *Id.*

The beginning point of the analysis must therefore be the state statute of limitations. And "[i]f an analogous state statute of limitations is found, it should be used, provided it is not at odds with federal substantive law." *Halkias*, 31 F.3d at 242-243 (J. Wisdom, dissenting). In this case, the analogous state statute of limitations which the Respondents urge this Court to adopt are not in any way at odds with the substantive federal policies contained in the WARN Act.

Petitioners' have therefore, boldly and significantly, attempted to alter the impact of the presumption in favor of state statutes of limitations. The entire premise of the Petitioners' argument is thus flawed. Contrary to the Petitioners' assertion, the current doctrine is not "fatally defective." The Petitioners erroneously identify the Rules of Decision Act as the genesis of the doctrine. *See Agency Holding Corp.*, 483 U.S. at 157 (*Scalia*, concurring). However, this Court has "applied state limitations periods to federal causes of action because we believed that those state statutes applied of their own force, unless pre-empted by federal law." *Id.*

Nonetheless, the Petitioners ask this Court to abolish its long-standing practice solely because Congress has seen fit to require that all civil claims arising under fed-

eral legislation passed after December 1, 1990, be subject to a new "fallback" statute of limitations. 28 U.S.C. § 1658. Yet, the Petitioners' argument ignores that Congress could have applied this law retroactively, but did not. The Petitioners offer no compelling reason why this Court should do what Congress declined to do.

However, even on its own terms, the Petitioners' argument is unconvincing. For, even if the presumption in favor of the state limitations periods could be overcome merely by demonstrating that the WARN Act possesses sufficient similarities to an existing federal scheme containing a limitations period, the fact remains that the "analogous" federal statute on which the Petitioners rely contains virtually no material similarities to the WARN Act.

As the Court of Appeals quite properly observed in this case, "[t]he primary purpose of the NLRA is to protect the right of workers to join together in labor organizations and collectively bargain for the terms and conditions of employment." *Crown Cork & Seal Co., Inc.*, 32 F.3d at 57 (3rd Cir. 1994), *citing United Paperworkers Int'l Union, Local 340 v. Specialty Paperboard, Inc.*, 999 F.2d 51, 54 (2nd Cir. 1993). Thus, in its broadest possible terms, the purpose of the NLRA is to ensure an equitable collective bargaining process. *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 20 (1987). Yet, even at this broad level of abstraction, the purpose of the NLRA and the WARN Act do not intersect.

The WARN Act was created to provide:

> [T]he protection to workers, their families and communities by requiring employers to provide notification 60 calendar days in advance of plant closings and mass layoffs. Advance notice provides workers and their families some transition time to adjust to the prospective loss of employment, to seek and obtain alternative jobs and, if necessary to enter a skill

> training or retraining that will allow those workers to successfully compete in the job market.

20 C.F.R. § 639.1 (1994). To accomplish this goal, the WARN Act provides a single cause of action in damages for the injuries caused by an employer's failure to provide adequate notice of impending employment loss. *Specialty Paperboard, Inc.*, 999 F.2d at 55; *Finkler v. Elsinore Shore Associates*, 725 F. Supp. 828, 830 (D.N.J. 1989).

While the WARN Act confers on unions standing to sue on behalf of injured employees, the broader interests that the statute was designed to protect—providing employees, their families, and their communities with a period of time to prepare for the impending hardships associated with loss of employment—do not involve a union's role as collective bargaining representative. Indeed, the rights created by the WARN Act are, by its express terms, "in addition to" rights created under the federal labor laws. 29 U.S.C. § 2105. The WARN Act, therefore,

> provides protection to individual union and nonunion workers alike, and this neither encourage[s] nor discourage[s] the collective bargaining processes that are the subject of the NLRA.

Fort Halifax Packing Co., 482 U.S. at 20-21.

The legislative history behind the enactment of the WARN Act clearly illustrates the sharp distinction which Congress intended to draw between the WARN Act and preexisting federal labor laws. Senator Metzenbaum, one of the principal sponsors of the WARN Act, stated:

> The rights and remedies set out in this bill are entitled to be separate from, and are not intended to supplant, limit or otherwise adversely affect, any other rights and remedies afforded employees or other persons by other statutes, such as the National Labor Relations Act, the Labor-Management Relations Act, the Employees Retirement Income Security Act, and

> the state plant closing laws that touch upon the subject of plant closings and mass layoffs. The Committee has not attempted to review the abovementioned federal laws, or the decisions interpreting those laws, and thus in reporting this bill, the Committee neither approves or disapproves of any such decisions.

S. Rep. No. 62, 100th Congress, 1st Sess. at 25. *Accord*, 134 Cong. Rec. 8611-12 (June 27, 1988).

Nor do WARN Act cases threaten to disrupt the formation or administration of collective bargaining agreements. The rights afforded individual workers under the WARN Act are independent of existing contractual relationships and cannot be modified by the parties:

> [T]he WARN requirements stand by themselves and cannot be set aside in favor of collective bargaining agreements, regardless of whether such agreements were entered into before or after the effective date of WARN.

54 Fed. Reg. 16,042, 16,044 (1989). The WARN Act does not affect union organizing, representation, collective bargaining, grievance dispute resolution, or any other aspect of labor-management relations. The statute involves only an employee's right to advance notice of imminent employment loss.

Perhaps the only point of congruence between the NLRA and the WARN Act is that both address the relationship of an employer and its employees. Yet even this statement is open to serious question. In actuality, the NLRA addresses the relationship between employers and employees while, in most situations, the WARN Act addresses the relationship between employers and their *former* employees.

This distinction is of considerable significance in light of the historical importance attached to the prompt and final resolution of ongoing labor disputes under the

NLRA. As Judge Wisdom perceptively observed in his dissenting opinion in *Halkias*:

> The reason for preferring rapid resolution of an ordinary labor dispute is that when the dispute is resolved, employees will go back to work, production will resume, the employer's sales will increase, and the positive effects of the business on the overall economy will return. Because strikes disrupt the status quo and hurt the economy, it is important to minimize the economic damage to the company and the community by ending them swiftly. Understandably, the NLRA sets a comparatively short limitations period (six months) as a means of achieving these goals.
>
> Those considerations, unfortunately, have no place in a scenario where WARN comes into play. When a WARN dispute is resolved, the plant stays closed. Employees fired en masse stay fired. Production does not resume. The economy does not return to the status quo ante.

Halkias, 31 F.3d at 244. An "analogy" between these two federal statutes simply cannot overcome the well recognized presumption in favor of the adoption of state statutes of limitations.

II. APPLICATION OF A SIX-MONTH STATUTE WOULD FRUSTRATE THE PURPOSES OF THE WARN ACT

Congress intended the WARN Act to be a broad, remedial statute. *Solberg v. Inline Corp.*, 740 F. Supp. 680, 685 (D. Minn. 1990). Since the passage of the statute, thousands of workers have gained advance notice of their layoffs. As the first federal law requiring any notice of plant closings and mass layoffs, Congress took a significant step in providing protection to those about to lose their jobs. Reports issued by the Economic Policy Institute and the National Academy of Science, and cited

by members of Congress during debate on the bill,[4] all document the economic and psychological benefits of advance notice to workers who are displaced, and to the nation, by reducing the average duration of unemployment and lessening the public costs of such unemployment. For example, Representative Foglietta observed that:

> The highly respected Economic Policy Institute found that advance notice requirements would reduce the period of joblessness by almost 4 weeks, would save $400 million in unemployment insurance costs, and would provide $1.5 billion in earnings to displaced workers. The report also cited a number of current studies by the Office of Technology Assessment and the National Academy of Science that failed to find evidence of substantial harm to business.[5]

The General Accounting Office, which conducted a study of employer compliance with the WARN Act in 1993, further identified that the success of counseling and job training assistance is often related to how early notice is provided to workers. "Dislocated worker studies report that far more workers seek assistance when help is available before or at the time of job loss than when it is available only after the workers have lost their jobs or benefits." [6]

The position advanced by the Petitioners would, however, "frustrate or significantly interfere with" these important federal policies. This is because, based on the

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[4] 134 Cong. Rec. S8449-54 (June 23, 1988); 134 Cong. Rec. S8449-72 (June 23, 1988); 133 Cong. Rec. S9389-92 (July 8, 1987); 134 Cong. Rec. S4540-48 (April 22, 1988).

[5] 134 Cong. Rec. H5516 (July 13, 1988).

[6] *Dislocated Workers: Worker Adjustment and Retraining Notification Act (WARN) Not Meeting Its Goals*, GAO/HRD-93-18 (February 1993).

"practicalities of litigation" under the WARN Act, the six-month period proposed by the Petitioners would substantially undermine the interests the statute was designed to serve.

For example, the WARN Act's advance notice requirements are triggered by either one of two occurrences, a "plant closing" or a "mass layoff." 29 U.S.C. § 2101 (a). Since the passage of the statute, much of the WARN Act litigation has involved the Act's "mass layoff" provision. Under this provision, a WARN Act cause of action may arise only if a certain number of employees (500) or a certain percentage (one-third) of the overall work force are the subject of an "employment loss." 29 U.S.C. § 2101(a)(3)(B). The term "employment loss" is also defined in the Act to include either an outright termination, a layoff exceeding six months, or "a reduction in hours of work of more than 50 percent during each month of any 6-month period." 29 U.S.C. § 2101(a)(6).

Unless a WARN Act claim based on a "mass layoff" is deemed to accrue at the time that the layoff or work reduction has lasted more than six months, the six-month statute of limitations proposed by Petitioners would be completely incompatible with the WARN Act's remedial purposes since an action of this type requires six months in which to ripen into a cause of action. 29 U.S.C. § 2101(a)(6)(B).[7] *See generally Kildea v. Elector Wire Products, Inc.*, 775 F. Supp. 1014, 1019 (E.D. Mich.

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[7] It should also be noted that the six month statute of limitations proposed by the Petitioners would not be a full six months with respect to a WARN Act claim based on a "plant closing" either. A "plant closing" is defined in the Act as a permanent or temporary shutdown of a single site, if that shutdown results in an employment loss "during any 30-day period for 50 or more employees." 29 U.S.C. § 2101(a)(2). Thus, a permanent or temporary "plant closing" cannot give rise to a WARN Act claim until at least thirty days have elapsed.

1991); *Jones v. Kayser-Roth Hosiery, Inc.*, 748 F. Supp. 1276, 1284 (E.D. Tenn. 1990).

Nor would a six-month limitations period be manageable in connection with a "mass layoff," even if the cause of action were deemed to accrue after the expiration of six months. In many cases employees are laid off on a staggered basis, in groups, weeks or months apart from each other. *See generally Kildea,* 775 F. Supp. 1014. Since the WARN Act requires a minimum number of employees and a minimum percentage of the workforce for a layoff to be defined as a "mass layoff" within the meaning of the Act, such a cause of action could not be said to accrue until the six months has run for all of the necessary number of adversely affected employees. *Cf., Auto. Mechanics Local 701 v. Santa Fe Term. Serv.*, 830 F. Supp. 432, 434-435 (N.D. Ill. 1993).

However, even assuming that the timing difficulties presented by the application of a six-month statute of limitations to a WARN Act claim could be remedied by an adjustment of the date that a cause of action accrues, the fact remains that the WARN Act itself creates a technical, highly complex threshold which must be met before a cause of action under the Act exists. *See generally Kildea,* 774 F. Supp. 1014. And, in light of the particular circumstances of the individuals who may be injured by a WARN Act violation, it is extremely doubtful that these complexities could be mastered within the six-month limitations period proposed by the Petitioners.

An individual with a viable WARN Act claim is in that position because he/she has lost a job in an unannounced mass layoff or plant closing. The first order of business for such an individual is not the undertaking of a lawsuit which promises limited and uncertain relief years in the future. Such an individual's primary concern in the weeks and months after the layoff or plant closing is securing a new job.

It is particularly with respect to non-union workers, lacking union counsel or readily available information about their rights, that the § 10(b) period would ultimately frustrate, rather than promote, the policies contained in the WARN Act. These concerns with the WARN Act's complexity and the difficulties presented by a short limitations period were admirably explained in Judge Wisdom's dissent:

> Non-unionized WARN plaintiffs are unlikely to have sufficient information to be able to bring suit within six months. Whereas unions are readily able to determine whether a sufficient number of their members have lost their jobs to invoke WARN's remedies, non-union employees must learn about the scope of a layoff by talking to co-workers and gradually compiling a list of those affected. This will be a time-consuming laborious undertaking.

Halkias, 31 F.3d at 245 (footnote omitted).[8]

This is especially so for seasonal workers, such as agricultural[9] and garment workers.[10] These workers are

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[8] In fact, Judge Wisdom recognized that: "The most severe aspect of the majority's holding is its decision to subject the non-unionized employees in this case to the strictures of the NLRA . . . [T]his truly baffles the laws of geometry." *Halkias*, 31 F.3d at 244.

[9] It is worth noting that the National Labor Relations Act expressly excludes agricultural workers. 29 U.S.C. § 152(3).

[10] In enacting WARN, Congress specifically addressed the issue of whether seasonal workers would be covered. One approach that would have excluded those who worked less than three months during the year was rejected. Ultimately, Congress determined that seasonal workers were entitled to the protection of the WARN Act unless they fit the definition of "part-time" workers in 29 U.S.C. § 2103(1). *Marques*, 867 F. Supp. 1438 (N.D. Cal. 1994) (holding WARN Act applies to seasonal workers employed as lettuce harvesters). *See also Solberg*, 740 F. Supp. at 685 (D. Minn. 1990) (the statutory definition of "part-time employees" includes those full-time workers who have been employed for fewer than six of the twelve months preceding the date notice is required).

typically unfamiliar with the legal system, uninformed as to their legal rights, and lack information concerning how to obtain legal representation. Generally these workers are not represented by unions. *See generally Marques v. Telles Ranch*, 867 F. Supp. 1438 (N.D. Cal. 1994). As documented in the Findings from the National Agricultural Workers Survey, many seasonal agricultural workers have low levels of education, do not speak or read English, and have incomes below the poverty level.[11] Since the only enforcement mechanism of the WARN Act is redress through the federal courts, dislocated workers carry a heavy burden to vindicate their rights.

In *DelCostello* this Court rejected the application of state statutes of limitations governing arbitration awards precisely because the short time periods provided in such statutes "fail to provide an aggrieved employee with a satisfactory opportunity to vindicate his rights under [federal law]." 462 U.S. at 166. In this case, it is the relatively short federal limitations period being advocated by the Petitioners which would deprive victims of WARN Act violations of a satisfactory opportunity to vindicate the rights which Congress has seen fit to provide.

Judge Wisdom's closing in his dissent in *Halkias* should be heeded:

> The plaintiffs, among countless others, have suffered the indignity of losing their employment without notice—in violation of federal law. In seeking the redress to which Congress has made them entitled, this Court has closed the gate on them one last time, on a legal principle so tenuous in foundation, it appears as but an academic exercise. Unfortunately for [the workers] and thousands of other workers similarly situated, it is anything but that.

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[11] Findings from the National Agricultural Workers Survey (NAWS): A Demographic and Employment Profile of Perishable Crop Farm Workers Executive Summary ii (1990).

> Because I believe that the Court's decision today promotes expediency and uniformity at the expense of the rights of workers, I dissent.

31 F.3d at 248.

CONCLUSION

This Court should not deviate from its general rule which calls for applying an analogous state statute of limitations where Congress has not provided a specific limitations period. Application of the six-month statute of limitations in cases brought under the WARN Act would bring harsh results, and frustrate Congress' intent in enacting the WARN Act to ensure that workers obtain notice prior to employment loss, and to protect those who do not.

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